Editor's note: Reconsideration denied by order dated Dec. 4, 1980 and by order dated Jan. 22, 1981; Appealed -- aff'd, Civ. No. C 81-0009 (D.Wyo. Dec. 23, 1981), 528 F.Supp. 980

JAMES R. LEARNED ET AL.

IBLA 80-125, 80-131, 80-144, 80-177, 80-179, 80-869 — Decided October 24, 1980

Consolidated appeal from decisions of the Wyoming State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers W-67928, etc.

Affirmed.

1. Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Lands Subject to Withdrawals and Reservations: Generally

   Where the Secretary of the Interior has specifically determined by formal publication of a memorandum that lands in a certain section of a national forest are to be withheld from leasing, he has exercised his plenary discretion to refuse to issue leases, and subsequent offers for affected lands are properly rejected.

2. Administrative Procedure: Generally--Appeals: Rules of Practice: Appeals: Dismissal--Secretary of the Interior

   The Board of Land Appeals is without jurisdiction to review and decide the validity or legality of a policy directive issued personally by the Secretary of the Interior in his capacity as chief executive officer of the Department, and an appeal limited to those issues must be dismissed.

3. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Lands Subject To

Where lands are withheld from leasing or have not been made subject to the operation of mineral leasing laws, applications must be rejected and cannot be held pending possible future availability of the lands. 43 CFR 2091.1.

APPEARANCES: J. R. Learned, Esq., Cheyenne, Wyoming, pro se, and for appellants Leah P. Golden, Petroleum Exploration Inc., Hal R. Johnson, Jr., Griffin and Barnett, Inc.; C.M. Peterson, Esq., Denver, Colorado, for appellant Kansas-Nebraska Natural Gas Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

James R. Learned, Leah P. Golden, Kansas-Nebraska National Gas Co., Inc., and Griffin and Barnett, Inc., have appealed from separate decisions of the Wyoming State Office, Bureau of Land Management (BLM), rejecting noncompetitive oil and gas lease offers for lands within the Teton National Forest. (See appendix.) The lands in question are expressly excluded from leasing by the August 15, 1947, memorandum of then Secretary of the Interior J. A. Krug, published at 12 FR 5859 (Aug. 15, 1947). The memorandum in part reads as follows:

> After conferring with proponents and opponents of oil and gas development in the Jackson Hole area of northwestern Wyoming, I have concluded that unit plans may be approved, oil and gas leases issued, and drilling authorized on lands in the Teton National Forest south of the 11th standard parallel, exclusive of lands lying within the Teton Wilderness Area south of said parallel, subject to the following conditions:
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> * * * * * * *
>
> The lands north of the area defined herein shall continue to be temporarily withheld from leasing under the oil and gas provisions of the Mineral Leasing Act, unless the lands in T. 45 N., R. 113 W., 6th P. M., Wyoming outside the Jackson Hole National Monument and outside the Teton Wilderness Area are deemed necessary to establish or complete a logical unit area.
>
> J. A. Krug,
> SECRETARY OF THE INTERIOR

12 FR 5859 (Aug. 15, 1947).

[1] Although the memorandum is not a formal withdrawal, the Secretary has discretionary authority over the issuance of oil and gas leases and may exercise his discretion by regulation or some other announcement of general impact. It is well established by the various courts that the Secretary has plenary authority and full discretion to refuse to issue a lease. Udall v. Tallman, 380 U.S. 1 (1963); United States v. Wilbur, 283 U.S. 414 (1930); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); James Donoghue, 24 IBLA 210 (1976).

Appellants contend that Secretary Krug's prohibition against oil and gas leasing in this area conflicts with the Wilderness Act of 1964, the Mining and Mineral Policy Act of 1970, and the Federal Land Policy and Management Act of 1976. Appellants therefore argue that the "Krug Memorandum" and such decisions applying it "are in direct and total conflict with the spirit and letter of the above cited statutes and therefore are in violation of the Constitution of the United States," citing Article 4, Section 3 of the Constitution and the Fifth Amendment thereto.

[2] We need not address these arguments in specific detail. Where appeals are directed solely to the validity and legality of a policy directive issued by the Secretary in the exercise of his official powers and duties the Board is without jurisdiction. The Board will only review the case to determine whether the directive was properly applied and implemented. Texas Oil and Gas Corp., 46 IBLA 50 at 52 (1980); see Robert Bailey, 12 IBLA 253 (1973), aff'd sub nom. Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976).

Appellant further argues that BLM acted capriciously by rejecting the lease applications while a petition to the Secretary for reconsideration of the Krug Memorandum is being actively considered; appellants therefore believe that the applications should be suspended pending consideration and decision by the Secretary. 1/

[3] When the approval of an application is prevented by withdrawal or reservation of lands, or for any reason the land has not been made subject, or restored, to the operation of public land laws applications must be rejected and cannot be held pending possible future availability of the land. 43 CFR 2091.1(a) and (e). See James Donoghue, supra at 215; John C. Amonson, 8 IBLA 346 (1972); Rowe M. Bolton, 5 IBLA 226 (1972). The Krug Memorandum is currently in effect and therefore precludes the leasing of the subject lands. The lease applications were properly rejected by BLM.

1/ While these appeals were pending Secretary Andrus, by his letter dated May 27, 1980, acknowledged that the "Krug Memorandum" is currently under review in the Department, but declined to take jurisdiction of appeal IBLA 80-144, indicating that this Board would dispose the case pursuant to "normal procedures."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

APPENDIX A

IBLA Docket No.	Appellant	Lease Offer No.	Date of BLM Decision
80-125	James R. Learned	W 67928 thru W 267934	10/22/79
80-131	Leah P. Golden	W 69555	10/22/79
80-144	Kansas-Nebraska National Gas Co., Inc.	W 54945 thru W 54951	10/22/79
80-177	Petroleum Exploration, Inc.	W 67280 W 67284 thru W 67286 W 67288 W 67289 W 67291 thru W 67296 W 68229	10/22/79
80-179	R. Hal Johnson	W 62579	11/13/79
80-869	Griffin & Burnett, Inc.	W 71628 thru W 71647 W 71649 thru W 71654 W 71656 thru W 71660	7/15/80

ADMINISTRATIVE JUDGE FREDERICK FISHMAN CONCURRING SPECIALLY:

The main opinion in essence holds that the Krug memorandum dictates the rejection of the offers, despite appellant's request that the offers be suspended pending a decision on their petition to have the Krug memorandum revoked or modified.

I have no doubt that BLM, not improperly, rejected the offers. On the other hand, it would not have been improper for BLM to have suspended the offers pending the decision sought by appellants. The Krug memorandum is not in haec verba or otherwise a withdrawal or other bar within the ambit of 43 CFR 2091.1--it is merely an exercise of discretion embodied in a policy statement.

Whether the offers should have been rejected or suspended was also discretionary and there is no cogent basis to find that the discretion was improperly exercised.

However, the policy of not encumbering the records and files with presently nonviable applications and the principle of fairness to all parties who rely on the records to determine availability are positive factors supporting the choice of rejection made by BLM.

I believe 43 CFR 2091.1(e) 1/ has applicability only to situations where the land had been withdrawn formally, the withdrawal

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1/ 43 CFR 2091.1 provides as follows:

§ 2091.1 Rejection of applications.

"Except where regulations provide otherwise, all applications must be accepted for filing. However, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:

"(a) Withdrawal or reservation of lands; except that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 and 2652 for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1601), unless the lands are withdrawn for the national park system or are withdrawn or reserved for national defense purposes.

"(b) An allowed entry or selection of record;

"(c) An irrevocable lease which grants the lessee exclusive use of the land;

"(d) Classification under appropriate law;

"(e) The fact that for any reason the land has not been made subject, or restored, to the operation of the public land laws."

revoked, or the land acquired in an exchange or otherwise, but not yet opened to the operation of the public land laws. That land is precluded from oil and gas leasing as a matter of Secretarial policy does not remove such land from "the operation of the public land laws," whose number is legion.

Frederick Fishman
Administrative Judge